

THE ENERGY REGULATORY ACT, 2007

Date of commencement: 1st March, 2007.

Date of assent: 20th November, 2006.

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SCHEDULE

An Act to establish an Energy Regulatory Authority and to provide for matters incidental to that Authority.

PART I

PRELIMINARY

Short title.

1. This Act may be cited as the Energy Regulatory Act, 2007.

Interpretation.

2. In this Act, unless the context otherwise indicates —

“Authority” means the Energy Regulatory Authority established under section 3;

“Board” means the Board of Directors of the Authority established under section 6;

“Electricity Act” means Electricity Act, 2007;

“energy” means such forms of renewable and non-renewable energy as are to be designated by the Minister in the Schedule to this Act;

“energy undertaking” means any undertaking selling energy, whether public or private, whose operation is conditional on the obligation to hold a licence issued by the Authority;

“energy laws” means laws governing the energy sector, existing or to be promulgated;

“licence” means a licence granted under section 5(1) of this Act, and “licensee” bears a corresponding meaning;

“Minister” means the Minister responsible for Energy Affairs;

“Ministry” means the Ministry responsible for Energy Affairs;

“National Control Centre” means a national control centre which monitors, controls and manages continuously the operations of generation, transmission and distribution systems;

“natural monopoly” means an energy undertaking where competition is not possible;

“regulated undertaking” means a licensed entity selling goods and services in the energy sector whose commercial terms and conditions are regulated by the Authority under power conferred to it by this Act and other energy laws conferring power to the Authority;

“this Act” includes the regulations, guidelines and rules made under this Act;

“Tribunal” means the Electricity Disputes Tribunal established under section 39 of the Electricity Act, 2007;

“utility” means a licensed undertaking, which provides services in a sector subject to special Government regulation.

PART II

ESTABLISHMENT AND ORGANISATION OF THE ENERGY REGULATORY AUTHORITY

Establishment.

3. (1) There is established an Authority known as the Energy Regulatory Authority.
- (2) The Authority is a Category B public enterprise as contemplated in the Public Enterprises (Control and Monitoring) Act, 1989.
- (3) The Authority is a body corporate having perpetual succession and may in its own corporate name sue and be sued and, for and in connection with the purposes of this Act and the energy laws, may perform and be capable of doing all such acts as a body corporate may by law perform.
- (4) The organisational structure and administrative procedure of the Authority shall be determined in accordance with internal regulations adopted by the Board.

General powers.

4. (1) The Authority may, in addition to the powers, functions and duties assigned to it under this Act and other energy laws defining its regulatory responsibilities —
 - (a) exercise any power and function and perform any duty incidental to the exercise of its powers or functions or the performance of its duties;
 - (b) exercise such powers or functions and perform such duties as may be assigned to it under other energy laws conferring power to the Authority or other Act of Parliament.
- (2) Future Acts of Parliament covering the regulation of public utilities in sectors other than energy may transform or integrate the Authority into a utility regulatory Authority expanding its powers to include the regulation of utilities in sectors other than energy; and having its name and governance structure changed accordingly.

Functions.

5. (1) The functions of the Authority under this Act, the Electricity Act or other energy laws are —
 - (a) to issue licences for undertakings in the energy sector;
 - (b) to receive and process applications for licences from undertakings in the energy sector;
 - (c) to prescribe conditions and terms of licences issued in terms of this Act.
 - (d) to modify licences and authorisations issued in terms of this Act;

- (e) to make and enforce directions to ensure compliance with licences issued in terms of this Act;
- (f) to regulate and approve tariffs, prices and charges and terms and conditions of services provided by licensed entities, according to the requirements and terms established in their licences;
- (g) to receive, investigate and adjudicate complaints from consumers on price adjustments made, or services provided, by any regulated undertaking;
- (h) regulate the inclusion of appropriate conditions to licences held by regulated undertakings;
- (i) to revoke any licence in the energy sector for good cause;
- (j) to investigate tariff charges, whether or not a specific complaint has been made for a tariff adjustment;
- (k) to encourage the development of uniform industry standards and codes of conduct;
- (l) in conjunction with other Government agencies, to monitor the levels and structures of competition within the regulated sub-sectors in order that competition in accessibility to the regulated sectors in the Kingdom of Swaziland is promoted;
- (m) to review the organisation of companies engaged in licensed activities to the extent that the organisation affects or is likely to affect the operation of the sector and the efficient supply of goods and services that are provided by licensed undertakings;
- (n) to develop and enforce performance standards for the licensed activities;
- (o) to encourage the development of uniform industry standards and codes of conduct;
- (p) in conjunction with other Government agencies, to design standards with regard to the quality, safety and reliability of supply of the goods and services of regulated undertakings;
- (q) to establish a uniform system of accounts for licensees in the same category;
- (r) to prepare industry reports and to gather information from licensed companies;
- (s) to prescribe and collect licence fees in the energy sector;
- (t) to approve codes of conduct in respect of the operation of licensed activities;
- (u) to acquire information and carry out investigations relating to any of its functions;
- (v) to promote consumer awareness and education in the energy sector;
- (w) to perform any other function that is incidental or consequential to its functions under this section, or as may be conferred on it by any other law;
- (x) to facilitate increasing access to the goods and services supplied by the regulated entities;
- (y) to recommend to the pertinent Ministers such reforms to this Act and the relevant sector laws as the Authority may deem desirable;

- (z) to verify periodic plans of energy consumption, production, transmission and distribution, including the associated investments, in order to ensure their adequacy and timely allocation;
 - (aa) to establish the controls to ensure legitimate competition in energy production and distribution activities with the aim of securing the interests of all licensees as well as consumers;
 - (bb) to review and approve the operational rules of the National Control Centre to ascertain the application of optimal criteria of operation and technical performance levels in co-ordination with the utilities; and
 - (cc) to do anything or exercise any other power or function that the Authority may lawfully do or exercise under this or any other energy law.
- (2) In exercising its powers and functions under this Act or the Electricity Act or other energy laws the Authority shall —
- (a) promote the interests of consumers of goods and services provided by regulated entities with respect to prices and charges and the continuity and quality of supply;
 - (b) promote and maintain the integrity and sustainability of regulated undertakings and seek to ensure that regulated undertakings, whilst providing efficient service, are able to finance the carrying on of the activities which they are licensed or authorised to carry on;
 - (c) promote economic efficiency in the supply of regulated services;
 - (d) distinguish in its level of intervention and imposed reporting requirements between regulation of natural monopolies and entities operating in competitive sectors; and
 - (e) regulate its affairs in a manner that is transparent and fair.

Establishment of the Board of Directors.

6. There is established a Board of Directors which is the governing body of the Authority and is responsible for carrying out the objects of, and exercising the powers and functions conferred on the Authority.

Composition of the Board of Directors.

7. (1) Subject to the provisions of section 8, the Board shall consist of the following persons appointed in terms of the Public Enterprises (Control and Monitoring) —

- (a) a chairperson, appointed by the Minister;
- (b) a deputy chairperson, appointed by Minister;
- (c) the chief executive officer who is an in *ex-officio* member;
- (d) not less than three and not more than five other members with in-depth knowledge of the energy sector, appointed by the Minister one of whom is a representative of the Ministry of Finance; and
- (e) a representative of the Swazi nation appointed by the *iNgwenyama*.

(2) The members of the Board, excluding the chief executive officer, are non-executive members.

(3) The chief executive officer is appointed by the Minister in accordance with section 8(1) of the Public Enterprises (Control and Monitoring) Act, 1989 and serves in a full time capacity.

(4) If the chairperson and deputy are for any reason unable to perform his duties, the other members shall choose another chairperson from amongst themselves as chairperson until the chairperson can resume the duties or another chairperson is appointed by the Minister.

(5) A member of the Board other than the chief executive officer, holds office for a period not exceeding three years.

(6) The Minister may, to ensure continuity, reappoint a member for one further period of office.

(7) A person may not be appointed to the Board for a consecutive period longer than six years.

(8) Where a member ceases to hold office for any reason, the Minister may appoint another person in that place for the remainder of the term of office on the Board.

(9) A member of the Board shall be paid such remuneration or allowances as the Minister may determine, with the concurrence of the Minister responsible for Finance.

(10) A member of the Board may be removed by the Minister where that member —

- (a) becomes of unsound mind;
- (b) has been absent from more than three consecutive meetings of the Board without leave of the chairperson;
- (c) resigns and has notified the chairperson in writing of the resignation;
- (d) materially transgresses any duty imposed under this Act;
- (e) is guilty of maladministration;
- (f) has shown gross incompetence in exercise of the duties under this Act;
- (g) becomes subject to the criteria specified in 8(6); or
- (h) is convicted of an offence specified in section 10(4).

Qualification of members of the Board of Directors.

8. (1) The chairperson and the deputy chairperson of the Board shall fulfil the following functional qualification requirements —

- (a) one of the two chairpersons shall have strong knowledge and experience in either engineering, economics and/or finance; and
- (b) the other shall have strong knowledge and experience in legal matters, particularly in matters relating to commercial and administrative law.

(2) In appointing members to the Board, the Minister shall ensure that —

- (a) members have adequate knowledge and experience in one or more of the following functional areas —
 - (i) energy supply and demand, including the end use consumption of electricity;
 - (ii) commercial and business practices and procedures;
 - (iii) financial and funding aspects of the energy sector;

- (iv) energy tariffs, pricing or charges;
- (v) energy planning and project development;
- (vi) technology and standards;
- (vii) environmental issues;
- (viii) consumer protection; or
- (ix) legal matters;

- (b) candidates are selected on the basis of their knowledge and experience of national, regional and international issues relating to the supply of energy;
- (c) the overall composition of the Board, as far as possible, reflects a balance of knowledge and experience relevant to the different types of energy supply regulated by the Authority and the distinct industries involved in the energy sector;
- (d) fair balance between continuity and capacity building is achieved.

(3) The Minister shall demonstrate impartiality and objectivity in appointing member of the Board.

(4) Subject to the provisions of the Public Enterprises (Control and Monitoring) Act, 1989, not more than one member of the Board may be an employee of the Government for the first three terms of the Board, and no member of the Board may be an employee of the Government thereafter.

(5) The chief executive officer shall have a strong background in engineering, finance or economics.

(6) A person may not be appointed as a member of the Board if —

- (a) that person is an unrehabilitated insolvent;
- (b) that person has been convicted of an offence involving an element of dishonesty; or
- (c) there is a possibility that a material conflict of interest may arise between the interest of that person as a member of the Board and the personal professional or business interests of that person.

(7) All members of the Board shall on appointment disclose their personal, professional or business interests in writing to the Minister and advise the Minister whenever those interests change.

Meetings of the Board of Directors.

9. (1) The members of the Board shall meet at such times and places and in the manner as determined by internal regulations adopted by the Board.

(2) The chairperson —

- (a) may at any time convene an extraordinary meeting of the Board to be held at a time and place and in the manner determined by the chairperson; and
- (b) shall, upon a written request of at least two other members of the Board, convene an extraordinary meeting to be held within two weeks after the date of that request.

(3) The Board may publish the procedure to be followed at meetings of the Board by by-law in the Gazette.

(4) In the absence of a published procedure under subsection (3), the person presiding at a meeting of the Authority shall determine the procedure to be followed at that meeting.

(5) At all meetings of the Board —

(a) the quorum shall be a majority of all the members of the Board;

(b) the decisions of a majority of the members present at that meeting shall constitute the decision of the Authority;

(c) in the event of an equality of votes on any matter the person presiding at a meeting has a casting vote in addition to a deliberative vote.

(6) A decision taken by the Authority or act performed under the authority of the Board is not invalid by reason only of a casual vacancy on the Board or of the fact that any person not entitled to sit as a member of the Board sat at that meeting at the time the decision was taken or the act was authorised.

(7) All meetings of the Board are public unless information materially affecting the rights of any person is tabled in which case an affected person shall indicate why that meeting should not be held in public, and the Board is satisfied to that effect.

(8) Where the Board takes a decision in any manner other than at a formal meeting such decision comes into effect immediately but shall be reduced to writing and submitted for noting at the first formal meeting of the Board following that decision.

Duties of members of the Board.

10. (1) A member of the Board shall —

(a) act in a justifiable and transparent manner whenever the exercise of discretion is required;

(b) at all times act in the interests of the Board and not in any sectoral interest;

(c) act independently of any outside influence or instruction; and

(d) act in a manner that is required of any holder of a public office.

(2) A member of the Board having any interest, directly or indirectly, in any matter under discussion by the Board, shall as soon as possible after the relevant facts have come to the knowledge of that member, disclose to the chairperson the facts of the interest and the nature of that interest.

(3) A disclosure under subsection (2) shall be recorded in the minutes of the Board and, after the disclosure, the member —

(a) shall not take part nor be present in any deliberation or decision of the Board; and

(b) shall be disregarded for the purpose of constituting a quorum by the Board on the meeting in connection with the matter.

(4) Any member of the Authority who fails to disclose an interest as provided under subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding five thousand Emalangeneni or to imprisonment for a period not exceeding twelve months or both.

(5) The Minister may by notice in the Gazette increase the level of the fine set out in subsection (4).

(6) An act or proceeding of the Authority shall not be invalidated on the ground that any member of the Authority has contravened the provisions of this section.

Just administrative action.

11. (1) Any decision of the Authority affecting the rights of another person shall —
- (a) be within the powers of the Authority as set out in this Act;
 - (b) be taken within a procedurally fair process; and
 - (c) be reasonable.
- (2) Any person adversely affected by a decision of the Board —
- (a) shall on request be furnished with written reasons for the decision;
 - (b) may bring such action under review by the Electricity Disputes Tribunal.

Executive committees.

12. (1) The Authority may appoint committees consisting of as many members of the Authority and employees of the Authority as may be deemed necessary to perform such functions or exercise such powers of the Authority as the Authority may perform or exercise under this Act, and may at any time dissolve or reconstitute those committees.

(2) The chairperson of a committee appointed under this section shall be a member of the Authority.

(3) The Authority is not divested of any function or power conferred upon a committee under subsection (1).

(4) Any decision of a committee performing a function or exercising a power of the Authority shall be tabled at a meeting of the Board and may be withdrawn or amended by the Board or referred back to that committee and shall, until it has been so withdrawn or amended, be deemed to be a decision of the Authority.

Advisory committees and customer forums.

13. (1) The Authority may appoint committees consisting of as many of the members of the Authority, employees of the Authority and other persons as may be deemed necessary to advise the Authority in general or on a particular matter.

(2) The Authority may establish consumer forums consisting of as many of the members of the Authority, employees of the Authority and other persons as may be deemed necessary to represent the interests of consumers of electricity or other energy sectors in relation to consumer information, education and dispute resolution.

Personnel.

14. (1) The chief executive officer —
- (a) is responsible for —
 - (i) the management of the affairs of the Authority, subject to the directions of the Board; and

(ii) administrative control over the employees appointed under paragraph (b);

(b) may, subject to subsection (c), and on such conditions as the Board may determine, appoint the employees or contract with any person to supply services as may be necessary to perform the work connected with the powers, functions and duties of the Authority.

(2) The Authority shall pay the chief executive officer and the employees such remuneration, allowances, subsidies and other benefits in accordance with a remuneration structure as shall be determined from time to time by the Board and approved by the Minister.

(3) The Authority may from time to time and on such terms and conditions, as the Board shall determine —

(a) provide collateral security, including guarantees, to a financial institution in respect of a loan granted to any employee of the Authority by any financial institution to enable that employee to acquire, improve or enlarge immovable property for the purpose of residential occupation by that employee;

(b) establish and manage or cause to be established and managed pension fund schemes, medical aid schemes or bursary schemes for the employees or the dependants of those employees.

Services.

15. The chairperson may, subject to such condition as the Authority may determine, contract with any person to provide goods or supply services as may be necessary to perform the work connected with the powers, functions and duties of the Authority.

Funding.

16. (1) The revenues of the Authority consist of —

(a) licence fees and or levies imposed under subsection (2);

(b) such sums as may be provided by Parliament from time to time for the purposes of this Act and the energy laws, including donor funds; and

(c) any other funds that may be raised.

(2) The Minister may, on receipt of the business plan and budget of the Authority, by notice in the Gazette prescribe licence fees and or levies and charges that are payable by a category of licensees and customers set out in the notice.

(3) Any licence fee and/or levy paid in terms of subsection (2) may be recovered from the consumers of the licensee paying that levy and or licence fee.

(4) The licensee concerned shall pay the licence fee and/or levy collected in terms of subsection (2) to the Authority, to be utilised by the Authority in terms of subsection (6).

(5) Levies referred to in subsection (2) —

(a) are valid for the period specified in the notice;

(b) are payable in respect of the energy, calculated in a manner set out in the notice, sold for final consumption to consumers;

(c) are payable at the times and in the instalments set out in the notice; and

(d) bear interest, in the case of non-payment or late payment, at a rate set out in the notice.

(6) The Authority shall utilise its funds to defray expenses in connection with the performance of its functions and the exercise of its powers in terms of this Act and the energy laws.

(7) The Authority shall during each financial year, at least three months prior to the ensuing financial year, submit a business plan and budget for that financial year to the Minister for approval.

Accounting and accountability.

17. (1) The chief executive officer is the responsible officer of the Authority and shall —
- (a) cause proper records to be kept of all financial transactions, assets and liabilities of the Authority;
 - (b) open one or more bank accounts in its name with one or more recognised financial institutions and deposit therein all the money received from the sources referred to in section 16(1); and
 - (c) as soon as possible after the end of each financial year, cause an income statement and balance sheet of the Authority for that financial year to be prepared.
- (2) The accounts of the Authority shall be audited annually by independent auditors appointed by the Minister on the recommendation of the Authority.
- (3) The financial year of the Authority is the same as that of the Ministry.

Delegation of powers and authority.

18. (1) The Authority may delegate any power or function assigned to it under this Act to the chairperson or any member of the Authority or to any employee seconded to the Authority to facilitate the day to day operation of the Authority.
- (2) The chairperson may with the approval of the Authority delegate any power or function assigned to the chairperson under this Act to any member of the Authority or to an employee seconded to the Authority.

Reporting.

19. (1) The Authority shall —
- (a) furnish the Minister with such information and particulars as the Minister may from time to time require in connection with the affairs and financial position of the Authority;
 - (b) annually, within six months after the end of each financial year, furnish to the Minister a report with regard to the functions, affairs and financial position of the Authority in respect of that year for submittal to Parliament within thirty days after receipt of that report or, if Parliament is not then sitting, within fourteen days after the commencement of the next ensuing sitting.
- (2) The annual report referred to in subsection (1) shall, among other things, include —

- (a) an audited balance sheet and income statement, including any notes thereon and documents annexed thereto whereby relevant information is provided;
- (b) information regarding licences granted, renewed, amended, suspended or revoked;
- (c) information regarding rules made, guidelines given and directives issued;
- (d) the report on the audit referred to in section 17(2);
- (e) a report regarding the execution of the business plan of the Authority;
- (f) a report of the future strategic plans of the Authority;
- (g) a status report on the performance of the energy sector and energy undertakings; and
- (h) such other information as the Authority may from time to time deem necessary.

PART III
REGULATION PROCEDURES AND PRINCIPLES

Regulations.

20. (1) The regulations, procedures and principles to be followed by the Authority are defined in the Electricity Act and in other energy laws conferring power to the Authority.
- (2) The Minister may make regulations for the better or effective operation of the Authority.

PART IV
MISCELLANEOUS AND SUPPLEMENTAL

Obligation of secrecy.

21. (1) Except for any of the purposes of the Electricity Act and other energy laws conferring power to the Authority or for the purpose of any civil or criminal proceedings under any written law or where otherwise authorised by the Authority, a member of the Authority or any of its committees, whether during the tenure of office or during the secondment or employment of that member or for a period of five years after that employment, shall not disclose any information which has been obtained by that member in the course of duties and which is not published in pursuance of this Act or the energy laws.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding ten thousand emalangeni (E10 000) or to imprisonment not exceeding ten (10) years.

SCHEDULE

Forms of energy to be regulated.

Electricity generation; transmission; distribution and supply in terms of the Electricity Act, 2007.